

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

ERNEST BAKER,

:

Petitioner, : Case No. 1:10-cv-796

:

-vs- : District Judge Michael R. Barrett
Magistrate Judge Michael R. Merz

WARDEN, Chillicothe Correctional
Institution,

:

Respondent.

**REPORT AND RECOMMENDATIONS ON MOTION FOR CERTIFICATE OF
APPEALABILITY**

This case is before the Court on Petitioner Ernest Baker's Application for Certificate of Appealability (Doc. No. 16).

The Application was filed December 6, 2011, and bears a Certificate of Service dated December 2, 2011. Under *Houston v. Lack*, 487 U.S. 266 (1988), Mr. Baker is entitled to have December 2, 2011, count as the filing date.

Judgment was entered in this case on November 9, 2011, dismissing the Petition with prejudice and denying a certificate of appealability. Because the Application seeks to change that denial into a grant, it must be considered as a motion to amend the judgment under Fed. R. Civ. P. 59(e). The Motion is timely because it was filed within twenty-eight days of judgment.

The instant Motion is post-judgment and therefore deemed referred under 28 U.S.C. § 636(b)(3). It thus requires a report and recommendations from a Magistrate Judge.

As provided in 28 U.S.C. §2253, a petitioner seeking to appeal an adverse ruling in the district court on a petition for writ of habeas corpus or on a § 2255 motion to vacate must obtain a certificate of appealability before proceeding. The statute contemplates issuance by a circuit judge, but Rule 11(a) of the Rules Governing § 2254 cases provides:

The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

The Rule codifies prior practice in the Sixth Circuit. *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063 (6th Cir. 1997); *Kincade v. Sparkman*, 117 F.3d 949 (6th Cir. 1997)(adopting analysis in *Lozada v. United States*, 107 F.3d 1011, 1017 (2nd Cir. 1997).

To obtain a certificate of appealability, a petitioner must show at least that “jurists of reason would find it debatable whether the petition states a valid claim of denial of a constitutional right.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). That is, it must find that reasonable jurists would find the district court’s assessment of the petitioner’s constitutional claims debatable or wrong or because they warrant encouragement to proceed further. *Banks v. Dretke*, 540 U.S. 668, 705 (2004); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). If the district court dismisses the petition on procedural grounds without reaching the constitutional questions, the petitioner must also show that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484. The procedural issue should be decided first so as to avoid unnecessary

constitutional rulings. *Slack*, 529 U.S. at 485, citing *Ashwander v. TVA*, 297 U.S. 288, 347 (1936)(Brandeis, J., concurring). The first part of this test is equivalent to making a substantial showing of the denial of a constitutional right, including showing that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further, *Slack v. McDaniel*, 529 U.S. 473 at 484, 120 S. Ct. 1595, 1604, 146 L. Ed. 2d 542 (2000), quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

The standard is higher than the absence of frivolity required to permit an appeal to proceed *in forma pauperis*. *Id.* at 893.

Obviously the petitioner need not show that he should prevail on the merits... Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'

Id. n.4. Accord, *Miller-El v. Cockrell*, 537 U.S. 322 (2003). A certificate of appealability is not to be issued *pro forma* or as a matter of course. *Id.* at 1040. Rather, the district and appellate courts must differentiate between those appeals deserving attention and those which plainly do not. *Id.* A blanket certificate of appealability for all claims is improper, even in a capital case. *Frazier v. Huffman*, 348 F.3d 174 (6th Cir. 2003), citing *Porterfield v. Bell*, 258 F.3d 484 (6th Cir. 2001).

All four of Mr. Baker's Grounds for Relief had been decided on the merits in the state courts and thus are reviewed here under the deferential standard of 28 U.S.C. § 2254(d)(1). The Report recommended dismissing the Petition with prejudice because Mr. Baker had not shown that the state court decision on any of the claims was an objectively unreasonable application of clearly

established Supreme Court precedent. In fact, this conclusion was sufficiently clear that the Magistrate Judge concluded no reasonable jurist would disagree and recommended a certificate of appealability be denied, a recommendation Judge Barrett adopted over Mr. Baker's Objections (Doc. No. 13).

In neither the Objections nor the current Motion does Mr. Baker address the legal standard for grant a certificate of appealability. Instead, he argues the merits of his case and the asserted racist corruption of the Hamilton County and/or Ohio justice system.

Having reviewed the Report, the Magistrate Judge remains persuaded that reasonable jurists would not disagree with its conclusions. It is therefore recommended that Petitioner's Application for Certificate of Appealability, construed as a motion to amend the judgment, be denied.

December 7, 2011.

s/ **Michael R. Merz**
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(d), this period is extended to seventeen days because this Report is being served by one of the methods of service listed in Fed. R. Civ. P. 5(b)(2)(C), (D), (E), or (F). Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure

may forfeit rights on appeal. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140 (1985).